

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

COPY

FRANCIS FOGARTY, JR.,

Plaintiff,

Civil Case No. 15-v-01454
(GLS/DJS)

-against-

CITY OF TROY and City of Troy Police Officers KYLE
JONES and ROBERT SMITH, both individually and/or as
agents, servants, and/or employees of the City of
Troy,

Defendants

EXAMINATION BEFORE TRIAL of the Plaintiff,

FRANCIS FOGARTY, JR., held pursuant to notice, on June
27, 2016, at 9:05 a.m. in the Kindlon Law Firm, PLLC,
74 Chapel Street, Albany, New York, before Mary Ellen
Tardiff, a Shorthand Reporter and Notary Public in and
for the State of New York.

APPEARANCES:

For the Plaintiff:

THE KINDLON LAW FIRM, PLLC
74 Chapel Street
Albany, New York 12207
BY: GENNARO D. CALABRESE, ESQ.

For the Defendant:

BAILEY, KELLEHER & JOHNSON, PC
Pine West Plaza 5, Suite 507
Washington Avenue Extension
Albany, New York 12205
BY: JOHN W. BAILEY, ESQ.

S T I P U L A T I O N S

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that presence and oath of a Referee be waived;

IT IS FURTHER STIPULATED AND AGREED that the transcript be signed and that the filing of the original transcript with the Federal Court be waived;

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to form, are reserved until the time of trial;

IT IS FURTHER STIPULATED AND AGREED that this deposition may be utilized for all purposes as provided by the Federal Rules of Civil Procedure;

AND FURTHER STIPULATED AND AGREED that all rights provided to all parties by the Federal Rules of Civil Procedure shall not be deemed waived and the appropriate sections of the Federal Rules of Civil Procedure shall be controlling with respect thereto.

1 **F R A N C I S F O G A R T Y, J R,**
2 having been first duly sworn by the Notary Public, was
3 examined and testified as follows:

4 **EXAMINATION BY MR. BAILEY:**

5 Q. Good morning, Mr. Fogarty.

6 A. Good morning.

7 Q. My name is John Bailey and I'm going to
8 ask you some questions today about what's called a --
9 I think we're at the Notice of Claim or -- it's
10 actually in suit.

11 MR. CALABRESE: Yes.

12 Q. Okay. So a case actually in suit and I'm
13 representing the City of Troy. Now, if you don't
14 understand a question I ask you, just tell me and I'll
15 try to rephrase it so that you do. It's important
16 that you understand the questions I'm asking you. Do
17 you understand that?

18 A. Yes.

19 Q. So if you answer I'm going to assume you
20 did understand my question. Fair enough?

21 A. Yes.

22 Q. Also I'm probably going to ask you some
23 fairly personal questions. I'm not doing it to

1 embarrass you or upset you. But it's information I
2 think I need to have in order to evaluate your case.
3 Do you understand that?

4 A. Yes.

5 Q. Okay. So for the record, tell me your
6 name.

7 A. Francis Anthony Fogarty, Jr.

8 Q. And where do you live, Mr. Fogarty?

9 A. [REDACTED]

10 Q. And where is that?

11 A. [REDACTED]

12 Q. [REDACTED] And for how long have
13 you lived there?

14 A. About six months.

15 Q. Whom do you live there with?

16 A. My fiancée.

17 Q. And what is her name?

18 A. Stephanie.

19 Q. And what's her last name?

20 A. Mosca, M-O-S-C-A.

21 Q. What is your date of birth?

22 A. [REDACTED]

23 Q. Do you have any children?

1 A. Yes.

2 Q. And could I have their names and ages,
3 please?

4 A. [REDACTED]
5 [REDACTED]

6 Q. Now your four children, are they children
7 by Stephanie or by another woman?

8 A. By another woman.

9 Q. The same woman?

10 A. Yes.

11 Q. All right. And was her name?

12 A. Sarah.

13 Q. S-A-R-A?

14 A. H.

15 Q. Okay. And does she still maintain the
16 name Fogarty or does she go by another last name?

17 A. It's Gamash. G-A-M-A-S-H, I believe.

18 Q. Okay. All right. And were you and Sarah
19 married?

20 A. Yes.

21 Q. Do you recall the date that you were
22 married?

23 A. February 14, 2009.

1 Q. Okay. And your four children, do they
2 live with you, with Sarah, or back and forth a little
3 bit?

4 A. With Sarah.

5 Q. With Sarah. Where does Sarah currently
6 live?

7 A. [REDACTED]

8 Q. And I assume you're divorced?

9 A. Yes.

10 Q. And when were you divorced?

11 A. About a year ago.

12 Q. Okay. Now, I'm going to try to question
13 you in subject matter so it will make a little more
14 sense. The first thing I'd like to know about you is
15 your educational background. Did you go to high
16 school?

17 A. Yes.

18 Q. Where?

19 A. Cohoes High.

20 Q. Did you graduate?

21 A. No.

22 Q. How far did you go?

23 A. 10th grade.

7

1 Q. Okay. Have you obtained a GED degree or
2 any other education, formal education beyond that?

3 A. GED.

4 Q. When did you get your GED?

5 A. 2004.

6 Q. Okay. And after you obtained the GED did
7 you go on and study anything further, any kind of
8 trade or any kind of studies at all?

9 A. No.

10 Q. All right. Let's switch gears now to
11 career. Since you left high school, and I appreciate
12 it's been a few years, I don't want to know, you know,
13 any part time job that you had for a few weeks. But
14 can you tell me just generally how you made a living?

15 A. I worked.

16 Q. Okay. And what's the nature of your
17 employment?

18 A. I went from moving to electricity.

19 Q. All right. So you were involved in the
20 moving business?

21 A. Yes.

22 Q. As a laborer or --

23 A. Yeah, laborer.

1 Q. And what company did you work for?

2 A. Ashline.

3 Q. Where are they located?

4 A. Watervliet.

5 Q. For how long did you work for Ashline?

6 A. About ten years on and off.

7 Q. Did you work for any other moving
8 companies?

9 A. No.

10 Q. Now, you mentioned after moving you became
11 involved in the electricity field. Are you an
12 electrician?

13 A. Apprentice.

14 Q. You're currently an apprentice?

15 A. Yes.

16 Q. Do you work out of a union or union hall?

17 A. It's non-union.

18 Q. Where do you work as an electrician?

19 A. A.E. Rosen Electric.

20 Q. Where are they located?

21 A. Albany.

22 Q. How long have you worked there?

23 A. About two and a half years.

1 Q. And how far along in your apprenticeship
2 are you?

3 A. I just started.

4 Q. Okay. You've been there about two and a
5 half years?

6 A. Yes, I worked in the warehouse.

7 Q. So you've worked as a laborer and then
8 during the course of that you thought you might like
9 to become an electrician so you got involved in the
10 apprentice program?

11 A. Yes.

12 Q. For how long is the apprentice program?

13 A. It can go from three to five years.

14 Q. You're just sort of getting going on that,
15 is that correct?

16 A. Yes.

17 Q. Any other major jobs, meaning jobs that
18 you had for a year or more, from the time you left
19 high school?

20 A. I worked for another electrical company.

21 Q. Who was that?

22 A. Kasselmann.

23 Q. Kasselmann?

1 A. Yeah, with a K.

2 Q. And where are they located?

3 A. Albany.

4 Q. Do you know the address in Albany?

5 A. It's Madison Avenue. I do not.

6 Q. Okay. Is that a fairly small shop,

7 Kasselman?

8 A. They're kind of big.

9 Q. Okay. All right. And how about A.E.

10 Rosen?

11 A. They're pretty big.

12 Q. And they're located here in Albany?

13 A. Yes.

14 Q. Do you know what street they're on?

15 A. They are 883 Broadway.

16 Q. And just so I understand, why did you
17 leave Ashline Moving?

18 A. They were going out of business. Work was
19 slow.

20 Q. And how about Kasselman? Why did you
21 leave?

22 A. They were doing layoffs. I got laid off.

23 Q. All right. The next topic I wanted to ask

1 you some questions about is your health history.

2 Okay. Currently do you have a health care provider?

3 A. Yes.

4 Q. Is that provided through your employer?

5 A. No.

6 Q. Who provides you with your health
7 coverage?

8 A. Oh, yes. It is through my employer. Sorry
9 about that.

10 Q. So A.E. Rosen --

11 A. Yes.

12 Q. -- provides you with coverage? And do you
13 know who your HMO is? Is it Blue Cross/Blue Shield?
14 CDPHP? I know there's a few of them.

15 A. I can't recall the name of it.

16 Q. Okay. All right. Now just in a very
17 general way, how would you describe your health let's
18 say from the time you were in high school to the
19 present?

20 A. Pretty good.

21 Q. Okay. Have you had major health problems,
22 problems that required treatment by a specialist or
23 hospitalization?

1 A. No.

2 Q. I assume you've had, like everyone else
3 you've had a bout or two of the flu and things of that
4 type?

5 A. Yeah.

6 Q. Okay. But no major injuries? In other
7 words, you've never broken a bone that required it to
8 be either set or fixed or treated, anything of that
9 type?

10 A. No.

11 Q. Have you been injured in any type of
12 accident?

13 A. No.

14 Q. Do you suffer from any medical conditions
15 for which you need to be treated by a specialist?

16 A. No.

17 Q. Are you on any medication of any type?

18 A. Yes.

19 Q. What type of medication are you on?

20 A. I'm on Prozac.

21 Q. Anything else?

22 A. Wellbutrin.

23 Q. Wellbutrin. Okay.

1 A. And Risperdal.

2 Q. Can you take a stab at spelling that?

3 A. I have no idea.

4 Q. All right. If we do it phonetic it's
5 wispherdol?

6 THE REPORTER: I'll find it.

7 Q. And who prescribed those medications for
8 you?

9 A. My med doctor.

10 Q. All right. And who, your primary care
11 doctor you're saying?

12 A. Yeah.

13 Q. And who is that?

14 A. It's Fran. I just know her by Fran. That's
15 at Vitally. (Phonetic.)

16 Q. Can you try to spell that late?

17 A. V-I-T-I-L-Y, maybe.

18 Q. And is Fran a man or woman?

19 A. Woman.

20 Q. Where is her medical practice?

21 A. Clifton Park.

22 Q. Do you know where in Clifton Park?

23 A. It's off Route 9.

1 Q. Is it her practice under her name or does
2 it go under Clifton Park --

3 A. No, it's under Vitally.

4 Q. Okay. Now, has she been your primary care
5 doctor for sometime?

6 A. No, I just started seeing her.

7 Q. Before Dr. Vitally who was your primary
8 care doctor?

9 A. No, Vitally is the place I go to. I don't
10 recall Fran's last name.

11 Q. Okay. So you don't know her last name?

12 A. No.

13 Q. All right. So it's Vitally Medical Group
14 or something like that?

15 A. Yes.

16 Q. And Fran, is she a doctor or nurse
17 practitioner, do you know?

18 A. No, she's a psych doctor.

19 Q. Okay. Do you have a primary care doctor?

20 A. Yes.

21 Q. Just somebody that you go to if you don't
22 feel well?

23 A. Yes.

1 Q. Who is that?

2 A. Kathleen. That's Cohoes Family Care.

3 Q. And do you know Kathleen's last name?

4 A. I do not.

5 Q. Is she a doctor?

6 A. She's a nurse practitioner.

7 Q. Okay. So we have Fran and the Vitally
8 group who treats you and Kathleen who's a nurse
9 practitioner in Cohoes Family Care, is that correct?

10 A. Yes.

11 Q. Are you seeing or have you seen any other
12 doctors or physicians in a the past five years?

13 A. No.

14 Q. All right. I want to take you back to
15 December the 23rd, 2012, and that's the date that it's
16 alleged this incident occurred. Do you recall that?

17 A. Yes.

18 Q. All right. Do you remember was it that
19 day? Was it December 23rd, 2012?

20 A. Yes.

21 Q. Have you reviewed any documents or seen
22 any pictures or photographs to help you prepare for
23 your testimony here today?

1 A. I don't recall, no.

2 Q. Okay. About what time of the day or the
3 evening on December 23rd, 2012, did this I'm going to
4 call it incident occur?

5 A. About between 1:00 and 2:00 a.m.

6 Q. All right. So it had slipped over from
7 the 22nd to the 23rd?

8 A. Yes.

9 Q. So is it fair to for me to assume you were
10 out on the night of the 22nd and then sometime after
11 midnight in the earlier morning hours of the 23rd is
12 when this incident happened?

13 A. Yes.

14 Q. Now, just generally where were you when,
15 and I know this was an event that unfolded over a
16 little period of time, but where did this incident
17 start, if I could ask you that?

18 A. It started on Broadway in Troy.

19 Q. And were you at a specific location on
20 Broadway?

21 A. I was at Bootleggers.

22 Q. And that's a bar and restaurant?

23 A. Yes.

1 Q. About what time did you get to
2 Bootleggers, if you know, in the early morning hours
3 of the 24th, or 23rd or on the 22nd?

4 A. I don't recall. It was the 22nd.

5 Q. So you were there before midnight?

6 A. Yes.

7 Q. Now, were you there with friends?

8 A. Yes.

9 Q. All right. Can you name the friend you
10 were with?

11 A. I was with my cousin, Danielle.

12 Q. Danielle, and what's Danielle's last name?

13 A. Baldwin.

14 Q. Baldwin?

15 A. And a couple of her friends. I don't recall
16 their names.

17 Q. Two or three friends? Do you remember how
18 many?

19 A. About three or four.

20 Q. Three or four friends. And you just don't
21 either know or remember their names as you sit here
22 today?

23 A. I do not.

1 Q. Where does Danielle Baldwin live?

2 A. She lives in Clifton Park.

3 Q. And she's your cousin?

4 A. Yes.

5 Q. Now, were you there with your wife?

6 A. No.

7 Q. And was this a prearranged meeting? In
8 other words, did you and your cousin, Danielle, talk
9 and say, hey, let's meet at Bootleggers tonight, or
10 how did it come about that you connected up with her?

11 A. I went there by myself and she was there.

12 Q. Okay. So you just bumped into her when
13 you went to Bootleggers?

14 A. Correct.

15 Q. I may have asked you this and if I have, I
16 apologize. About what time do you think you got to
17 Bootleggers on the night of the 22nd?

18 A. I don't recall.

19 Q. But it was sometime before midnight?

20 A. Yes.

21 Q. How much time were you there? How long
22 were you there before this incident began?

23 A. I don't recall. Not that long.

1 Q. Is there anything that you could look at,
2 any documents or anything at all that would help us
3 understand for how long you were at Bootleggers before
4 these events unfolded?

5 A. I'm not sure.

6 Q. Okay. You did say that the events began
7 at, I think you said 1:00 or 1:30 in the morning of
8 the 23rd?

9 A. Between 1:00 and 2:00, yes.

10 Q. Okay. So is it fair to say if you got
11 there at least sometime before midnight you were there
12 for maybe an hour, hour and a half or two hours before
13 this happened?

14 A. Yeah, about that.

15 Q. Was there anyone else in the bar that
16 evening that you knew other than your cousin,
17 Danielle?

18 A. My wife's cousin. My ex-wife.

19 Q. And what's her name?

20 A. Brenda Paul.

21 Q. Haul?

22 A. Yes.

23 Q. Where does Brenda Haul live?

1 A. Paul, P.

2 Q. P-A-U-L?

3 A. Yeah.

4 Q. Brenda Paul. Okay. Where does Brenda
5 Paul live?

6 A. Cohoes, I believe.

7 Q. And she's your wife's cousin?

8 A. Yes, ex-wife.

9 Q. Okay. Anybody else that you can remember
10 who was in Bootleggers that night while you were
11 there?

12 A. I don't know.

13 Q. Was that a place you would go from time to
14 time?

15 A. I've been there a couple of times.

16 Q. Do you know, for example, the owner or any
17 of the bartenders or any of the people that work
18 there?

19 A. I do not.

20 Q. Now, some point before the police got
21 involved in this situation, did your wife, your
22 ex-wife Sarah, show up at Bootleggers?

23 A. Yes.

1 Q. Can you tell us about what time?

2 A. Maybe an hour after I got there, maybe.

3 Q. All right. Would you say maybe it was at
4 midnight or a little after midnight?

5 A. Probably a little after midnight.

6 Q. Okay. Now, do you know why she showed up
7 there?

8 A. She thought I was cheating on her.

9 Q. All right. How did she know you were at
10 Bootleggers?

11 A. Her cousin, Brenda Paul.

12 Q. Did Brenda call her or text her or
13 something?

14 A. Yes.

15 Q. Do you know what she did? Do you know
16 whether she called her or texted her?

17 A. I do not.

18 Q. But you're fairly sure that it was Brenda
19 that told Sarah that you were at Bootleggers?

20 A. Yes.

21 Q. What's your basis for saying that? Did
22 somebody tell you that?

23 A. She told me.

1 Q. Brenda or your ex?

2 A. My ex-wife.

3 Q. So Sarah's saying that Brenda contacted
4 her and told her that you were at Bootleggers?

5 A. Correct.

6 Q. And is that why Sarah went to Bootleggers?

7 A. Yes.

8 Q. Because she thought you were cheating on
9 her with someone else, correct?

10 A. Yes.

11 Q. Now, when Sarah came in -- well, when
12 Sarah arrived in the area of Bootleggers were you
13 still in the bar?

14 A. Yes.

15 Q. Did she come into the bar?

16 A. No.

17 Q. How did you learn she was there?

18 A. Because I looked out and she was coming in.
19 I was walking out.

20 Q. All right. So as she was walking sort of
21 into the bar you saw her and you were going to walk
22 out of the bar?

23 A. Yes.

1 Q. Now, remember I told you at the beginning
2 I have to ask you some questions that are embarrassing
3 or could be and I'm not doing it to embarrass you but
4 I need to have the information? The woman that Sarah
5 believed you were cheating with, was she in the bar?

6 A. There was no woman. I wasn't cheating with
7 no woman.

8 Q. But the woman she believed you were
9 cheating with?

10 A. No.

11 Q. Did she ever give you any name of this
12 woman that she thought you were cheating with?

13 A. No.

14 Q. Do you know who she thought you were
15 cheating with?

16 A. I do not.

17 Q. Do you know what the basis is? Why did
18 she think you were cheating?

19 A. Because I was out at a bar and she actually
20 thought I wanted her cousin, I believe.

21 Q. That would be?

22 A. Brenda.

23 Q. So she thought, your wife had a suspicion

1 that you were interested in her cousin?

2 A. Yes.

3 Q. Well, did you say anything to her cousin
4 that evening that might have suggested to her you
5 wanted a relationship with her?

6 A. No. No.

7 Q. Did she say anything to you that suggested
8 to you that she might want a relationship with you?

9 A. No.

10 Q. All right. So let's try to get a time
11 line here. She's walking in. You're walking out. Do
12 you meet sort of on the sidewalk out in front of the
13 building?

14 A. Yeah.

15 Q. All right. Did the two of you reenter --

16 A. No.

17 Q. -- Bootleggers together?

18 A. No, we did not.

19 Q. So after you met at Bootleggers as you
20 just described, neither you nor she went back into
21 Bootleggers?

22 A. That's correct.

23 Q. Now, how busy was Bootleggers that night?

1 A. It was pretty busy.

2 Q. I've never been there. I've driven by it
3 a number of times. I know this is a bad question, but
4 give me a sense, is it a bar that holds how many
5 people? Best estimate. I appreciate you weren't
6 counting. 20 people, 30 people, 40 people, 50 people?

7 A. I would say over 50.

8 Q. And how many people do you think were in
9 the bar that evening at around midnight or 1:00
10 o'clock? Best estimate?

11 A. I have no idea.

12 Q. Okay. I appreciate you weren't counting
13 but your recollection is it was fairly busy?

14 A. Yes.

15 Q. Now, I want you to tell me in your own
16 words when you walked outside did you and Sarah have
17 some kind of either discussion or argument?

18 A. We had a discussion.

19 Q. How would you describe it? Was it a calm
20 discussion or was it fairly heated?

21 A. I really don't recall. It started calm.
22 Then it got, I would say not heated --

23 Q. Well, when you two met up face to face

1 outside the bar, what did she say to you?

2 A. I don't recall.

3 Q. What did you say to her?

4 A. I don't recall.

5 Q. Was there anyone with her?

6 A. No.

7 Q. Were there other people on the sidewalk?

8 A. Yes.

9 Q. Can you describe approximately how many?

10 A. They're probably pretty busy. I'm not sure.

11 Q. Okay. Did you know anyone aside from

12 Sarah? Did you know anyone who was standing outside
13 of Bootleggers?

14 A. I do not.

15 Q. As you sit here today you just don't have
16 a clear memory of what was said either by Sarah or by
17 you?

18 A. It was just talking. I don't recall what
19 was said, no.

20 Q. All right. Now, do people call you
21 Francis or Frank?

22 A. Frank.

23 Q. Frank, I'm going to try to ask you a

1 question. Just follow me here again. I'm not trying
2 to be offensive. I know that if my wife came to a bar
3 at 1:00 o'clock in the morning under those
4 circumstances, chances are she wouldn't be very happy
5 with me. Is that fair to say, that your wife was not
6 very happy with you?

7 A. Yes.

8 Q. Did she confront you? In other words, did
9 she say in sum or substance she thought you were
10 cheating?

11 A. I don't recall. It could be. I really
12 don't recall.

13 Q. Well, did she ask you what you were doing
14 at that bar at that time?

15 A. Yes.

16 Q. And do you remember what you said to her?

17 A. I don't.

18 Q. Did there come a point in time when she
19 made any comments to some of the men who were outside
20 that bar?

21 A. Yes.

22 Q. Is it true that she said, in sum or
23 substance to whatever group of men were there, that my

1 husband's cheating on me. I'm going to get even with
2 him. If any of you guys want to have sex with me
3 tonight, you can. Did she say something like that?

4 A. Towards them lines, yes.

5 Q. And some guy, probably drunk, said, yeah.
6 I'm okay. I'll do that. Is that fair to say?

7 A. Yes.

8 Q. All right. And you and this guy had some
9 kind of an altercation?

10 A. Yes.

11 Q. Did you punch him?

12 A. Yes.

13 Q. Did he punch you?

14 A. No.

15 Q. Now, was this about the time that the
16 police intervened?

17 A. Yep.

18 Q. Tell me what the police did?

19 A. I was -- they just came up to me and just
20 whacked me in the back of the leg and in the back.

21 Q. Now, was this after you were having this
22 fight with this other man?

23 A. It was after I was walking across the

1 street.

2 Q. Well, let's try to clean that up then.
3 This man makes this inappropriate comment to your
4 wife, correct?

5 A. Yes.

6 Q. And you walked over to him and you punched
7 him?

8 A. Yes.

9 Q. Was it a one pinch fight?

10 A. Yes.

11 Q. Okay. Did you hit him actually?

12 A. Yes.

13 Q. Did you hit him in the face?

14 A. Yes.

15 Q. Did you knock him on his back side?

16 A. I don't think so.

17 Q. All right. Safe to say though that the
18 fight was over at this point?

19 A. Yeah, that was it. Yep.

20 Q. Then did you walk away from what happened
21 at that point?

22 A. Me and my ex-wife was walking across the
23 street because she grabbed my arm and we walked.

1 Q. Okay. Across which street?

2 A. Across Broadway to the opposite side of the
3 bar?

4 Q. And then is that where your first contact
5 occurred with the police?

6 A. Yes.

7 Q. Was it on the other side of the street or
8 when you were walking across the street?

9 A. I believe it was while I was walking across
10 the street.

11 Q. Now did you have contact with one police
12 officer or more than one?

13 A. It was one.

14 Q. Did you know the police officer?

15 A. I did not.

16 Q. Could you describe him today as you sit
17 here?

18 A. If I seen him but I couldn't describe him.

19 Q. Tell us what happened in this first
20 interaction with this police officer?

21 A. He just came up to me and just whacked me in
22 the knee and whacked me in the back with his baton.

23 Q. Did he say anything to you?

1 A. He did not.

2 Q. When you say he whacked you in the knee,
3 which knee?

4 A. It was my right knee.

5 Q. Is in the kneecap area?

6 A. Behind.

7 Q. Behind the --

8 A. Behind the kneecap.

9 Q. All right. So he struck you behind your
10 kneecap on your right leg?

11 A. Yes.

12 Q. Where else did he strike you?

13 A. On my back.

14 Q. What part of your back?

15 A. My -- on this side, the right side of my
16 back. (Witness indicates.)

17 Q. Indicating with your hand the right side
18 of your back about mid back area on the side?

19 A. About that. Yeah, in the mid back area.

20 Q. Now, when he struck you were you facing
21 him or were you looking away from him?

22 A. When he hit me in the knee I was facing him
23 because -- yeah, I was facing him.

1 Q. All right. So you're walking across
2 Broadway. The officer walks up to you and you both
3 are sort of facing one another?

4 A. It happened so quick. He just whacked me.

5 Q. Okay. But I need to know. Did he come up
6 from behind?

7 A. Face.

8 Q. All right. So you were kind of walking at
9 one another?

10 A. Yeah.

11 Q. And you say what he did is the first blow
12 was to your knee area?

13 A. Yep.

14 Q. Did that cause you to fall or stumble?

15 A. It caused me to fall.

16 Q. All right. And did you fall to the
17 ground?

18 A. Yes.

19 Q. On the road?

20 A. Yes.

21 Q. After you fell on the ground, what
22 happened?

23 A. That's when he struck me in the back.

1 Q. What kind of clothing were you wearing?

2 A. I was wearing blue jeans and a gray hooded
3 sweatshirt, I believe.

4 Q. Now, do you remember the officer saying
5 anything to you?

6 A. No.

7 Q. Did you say anything to him?

8 A. No.

9 Q. Did Sarah say anything to the officer?

10 A. I don't believe so.

11 Q. Did the officer say anything to Sarah?

12 A. No.

13 Q. After that happened, that is after the
14 blow to your back as you were on Broadway, what
15 happened next?

16 A. All I heard is my ex-wife said "run." And I
17 ran down the alleyway.

18 Q. Do you recall whether or not Sarah herself
19 got into a physical confrontation with the police?

20 A. I don't believe so, no.

21 Q. But you heard Sarah say to you "run"?

22 A. Yes.

23 Q. Now why did she say that to you?

1 A. I believe she thought that the cop was being
2 unreasonable when he struck me.

3 Q. So in response to Sarah's voice or command
4 or instruction, whatever it was, "run," what did you
5 do?

6 A. I ran down the alleyway.

7 Q. Do you know what alleyway it was?

8 A. It was, I believe it was the alleyway from
9 Broadway to State, if that's correct.

10 Q. What kind of footwear did you have on, by
11 the way?

12 A. I think I had sneakers on.

13 Q. Okay. Did you get up and run?

14 A. Yes.

15 Q. Can you give me a sense of how far down
16 Broadway you had to run to get to this alley?

17 A. I think the alley was right there.

18 Q. Now, were you familiar just generally with
19 this part of Troy?

20 A. I'm familiar with Troy, yes.

21 Q. So when you were running down this alley
22 did you know where generally you were running towards?

23 A. Yes.

1 Q. And would that have been what, State
2 Street?

3 A. I believe that's what it is.

4 Q. In relation to downtown Troy, give me a
5 sense of -- can you give me some landmarks? Do you
6 know where the courthouse is?

7 A. It's before the courthouse. I think there's
8 a bank right there on the corner.

9 Q. All right. When you say "before" --

10 A. It's the same street as the police station's
11 on.

12 Q. Okay.

13 A. But it happened further up from the police
14 station.

15 Q. By farther up you mean more towards
16 Lansingburg as opposed to South Troy?

17 A. South Troy. It's between Fourth Street and
18 Third, I believe.

19 Q. Okay. So you run down this alley. What
20 happens next?

21 A. I run. I seen another police officer and I
22 ran to him.

23 Q. Where was this other police officer?

1 A. He was parked on the street facing the
2 opposite way.

3 Q. Did the officer, was he in a marked patrol
4 car?

5 A. He was in an SUV.

6 Q. Was it marked?

7 A. Yes.

8 Q. Did you clearly understand it was a police
9 vehicle?

10 A. Yes.

11 Q. And you ran towards the vehicle?

12 A. I ran to his window.

13 Q. And why did you do that?

14 A. Because I asked him for help.

15 Q. And do you know the name of that officer?

16 A. I believe it's Smith. I just know him from
17 the documents.

18 Q. But he's not somebody that you knew before
19 this?

20 A. No.

21 Q. Would you be able to pick him out if he
22 were sitting here today, do you think?

23 A. Yes.

1 Q. So you ran. Was he alone in his vehicle?

2 A. Yes.

3 Q. So you ran to the window. What did you
4 say to him?

5 A. I said, I need your help.

6 Q. And what did he say to you?

7 A. I believe he said, get on the ground, scum
8 bag, along those lines.

9 Q. What you're saying, is that sort of the
10 tenor of what he said to you?

11 A. Yes.

12 Q. Do you know whether or not this officer
13 had a canine, a dog in the car?

14 A. I do not think there was. It was a canine
15 unit vehicle, though.

16 Q. What did you do in response to his
17 command?

18 A. I got on the ground like he said.

19 Q. And what happened next?

20 A. He cuffed me behind my back.

21 Q. Okay. Did anything else occur?

22 A. Then the officer from the first altercation,
23 came running down the alleyway.

1 Q. And what happened after that?

2 A. He struck me in the head with his baton. He
3 kicked me twice in my right ribs.

4 Q. When that happened, at the time that
5 happened, the officer who stuck you with the baton is
6 the same officer that came up and then you say struck
7 you, kicked you and struck you in your rib area, is
8 that correct, and struck you in the head?

9 A. Yes.

10 Q. And that was the same officer that you had
11 the incident with outside Bootleggers?

12 A. Yes.

13 Q. Were there any other officers around other
14 than the two you talked about?

15 A. No.

16 Q. Now, have you ever injured your ribs at
17 any point before that night?

18 A. I have not.

19 Q. What happened after that? That is after
20 the officer -- did he kick you in the side? Is that
21 what you're saying?

22 A. He kicked me twice in the ribs.

23 Q. All right. And struck you, you say, in

1 the top of your head with his baton?

2 A. Yes.

3 Q. And you're saying that you were not
4 resisting in any way?

5 A. I was not in any way.

6 Q. You weren't refusing to get your hands out
7 from underneath you?

8 A. No, I was not.

9 Q. Did you have an object of some kind in
10 your hands?

11 A. Yes, I did.

12 Q. What was that?

13 A. It was a cell phone.

14 Q. Now, were you taken from the scene?

15 You're now on the ground. You just described this
16 incident. Were you taken somewhere from the scene?

17 A. Yes.

18 Q. Where were you taken?

19 A. I was taken to the police station.

20 Q. And what happened at the police station?

21 A. I was booked. Well, I was written a ticket.

22 Q. Okay. The officers were writing you some
23 tickets, is that correct?

1 A. Yes.

2 Q. And you went through the booking process?

3 A. Yes.

4 Q. Now, were you released that evening?

5 A. I was.

6 Q. And given what are called appearance
7 tickets?

8 A. Yes.

9 Q. Were you seen by any kind of medical
10 personnel that evening?

11 A. Yes. I believe the fire department came.

12 Q. Did they come when you were at the scene,
13 on let's call it State Street? Or did they come and
14 see you when you were at the police station?

15 A. When I was at the police station.

16 Q. Did they provide you any treatment?

17 A. They just put bandages on my head.

18 Q. Did you follow-up at some point after you
19 left the police station that night with medical care?

20 A. Yes, I went straight to the hospital.

21 Q. And which hospital was that?

22 A. Samaritan.

23 Q. And were you seen at Samaritan?

1 A. Yes.

2 Q. In the ER?

3 A. Yes.

4 Q. Were you kept overnight?

5 A. Yes.

6 Q. How long were you kept in the hospital?

7 A. About 11:00 o'clock, 12:00 o'clock that
8 morning.

9 Q. All right. So whatever time -- I'm
10 assuming because the booking process takes a little
11 time, I'm assuming maybe you got to the hospital, the
12 ER, maybe 3:00 o'clock, 4:00 o'clock, 5:00 o'clock,
13 something like that?

14 A. Yeah, it was around there, yeah.

15 Q. Okay. And you were seen there in the ER,
16 correct?

17 A. Yes.

18 Q. Were you ever placed in a hospital bed
19 outside the ER?

20 A. No, I was not.

21 Q. What treatment was rendered to you in the
22 emergency room? What did they do for you?

23 A. They put staples in my head and gave me

1 X-rays.

2 Q. All right. What part of your body did
3 they X-ray?

4 A. My ribs and to see if I had a collapsed
5 lung.

6 Q. Did they do any scans of your head or
7 studies of your head?

8 A. I think I had a CT scan. I'm not sure
9 though.

10 Q. And you were released around 11:00 o'clock
11 in the morning?

12 A. Around there. I was there a few hours, yes.

13 Q. After you were released, did you go home?

14 A. Yes.

15 Q. Did you follow up after this with medical
16 care treatment or with any physician?

17 A. Yes.

18 Q. And who did you follow-up with?

19 A. I went to a few ERs for my ribs, St. Mary's,
20 Albany Med.

21 Q. All right. So your ribs continued to
22 bother you?

23 A. Yes.

1 Q. Do you know, were you diagnosed with any
2 broken ribs?

3 A. I was diagnosed with two or three fractured
4 ribs.

5 Q. And who made that diagnosis?

6 A. The ER that night.

7 Q. At Samaritan?

8 A. Yes.

9 Q. And what treatment did they give you?

10 A. There's really no treatment for ribs. They
11 said they could wrap it. That's about it.

12 Q. Did they give you any medication?

13 A. No.

14 Q. Did they give you any type of medication
15 for any pain?

16 A. Tylenol.

17 Q. And because your ribs were still bothering
18 you, you went to the ER at St. Mary's?

19 A. I went to St. Mary's. I went, I believe one
20 time I went to urgent care, yes.

21 Q. All right. How about, you mentioned
22 Albany Med?

23 A. Albany Med. Yes.

1 Q. And urgent care?

2 A. Yes.

3 Q. Can you give us those in order? Did you
4 go to St. Mary's first, Albany Med then Urgent Care?

5 A. I don't recall.

6 Q. And what, if any, treatment were you given
7 by St. Mary's?

8 A. They just gave me, they just said basically
9 the same thing. I was X-rayed and that's about it.
10 There's really nothing to do with ribs.

11 Q. All right. How about Albany Med? Do you
12 recall what they did for you?

13 A. Initially the same thing.

14 Q. X-rayed your rib area?

15 A. Yes.

16 Q. And how about urgent care?

17 A. Basically the same thing.

18 Q. What urgent care did you go to?

19 A. Clifton Park.

20 Q. Do you know what their address is in
21 Clifton Park?

22 A. I don't -- I believe it's off of 146.

23 Q. Now, do you have any kind of criminal

1 history or record?

2 A. I do.

3 Q. Tell me about that, please.

4 A. I was incarcerated.

5 Q. All right. For what?

6 A. Attempted burglary.

7 Q. When was that?

8 A. 2003.

9 Q. And where did that allegedly occur?

10 A. Cohoes.

11 Q. Any other criminal history?

12 A. Just possession of stolen property.

13 Q. When did that occur?

14 A. When I was 15.

15 Q. Were you given youthful offender treatment
16 on that?

17 A. Yes.

18 Q. So that record has been expunged if you
19 were given --

20 A. I believe so, yes.

21 Q. So in terms of a record, the attempted
22 burglary is still a part of your criminal history?

23 A. I believe so.

1 Q. Is there anything else?

2 A. Just I have a couple possession of stolen
3 property on there.

4 Q. Are you aware of any witnesses to these
5 events other than Sarah?

6 A. I am not.

7 Q. Have you ever talked with anyone who said,
8 you know, I was there that night? I saw what
9 happened?

10 A. No, the only ones that were there was just
11 my cousin and her cousin.

12 Q. Do you know, did any one of them ever
13 relate to you either directly or through someone else
14 they saw what happened?

15 A. No.

16 Q. Do you believe either one of them saw what
17 happened?

18 A. They could have. I'm not sure.

19 Q. All right. In any event, you have not
20 talked to them so, for example, you haven't talked to
21 your cousin, Danielle?

22 A. I just seen her at the bar that night. I
23 mean, we're not that close really.

1 Q. But from that night in December of 2012 to
2 the present, she hasn't contacted you either to talk
3 to you or by text or on Facebook or something like
4 that?

5 A. I mean, she's my friend on Facebook but we
6 don't talk.

7 Q. So you've never talked about what she
8 claims she saw that night?

9 A. No.

10 Q. And how about Sarah's cousin?

11 A. I don't talk to her.

12 Q. Is there anyone else that has stated
13 anything to you about what they saw that evening?

14 A. No.

15 Q. All right. Now, switching back, medically
16 are you still being treated for any of your injuries?

17 A. At the moment, no.

18 Q. All right. Do any of the problems that
19 you complained about still exist?

20 A. Yes.

21 Q. What problems?

22 A. Occasionally my rib.

23 Q. Do you know which rib it is that's

1 bothering you?

2 A. The last time I was X-rayed they said the
3 ninth one still had a hairline fracture in it.

4 Q. Anything else currently bothering you?

5 A. I get migraines.

6 Q. Do you have a history migraines?

7 A. No.

8 Q. And tell me about your migraines. What
9 are they like?

10 A. They're just really bad migraines.

11 Q. Well, are they like headaches or visual
12 distortions?

13 A. They're like headaches.

14 Q. Are you seeing a doctor for that?

15 A. No. I'm on migraine meds for when I see
16 it's coming. I've seen a doctor.

17 Q. Which medication is for migraines?

18 A. I don't recall the name of it.

19 Q. Is it one of the three that you gave me in
20 the beginning or another medication?

21 A. No, it's another medication. I take it when
22 one is coming on.

23 MR. BAILEY: Okay. I have no

other questions. Thank you.

(Whereupon the deposition was
concluded at 9:50 a.m.)

* * * *

STATE OF NEW YORK

SS:

COUNTY OF _____

I have read the foregoing record of my
testimony taken at the time and place noted in the
heading hereof and I do hereby acknowledge it to be a
true and accurate transcript of same.

FRANCIS FOGARTY, JR.

Sworn to before me this

____ day of _____, 2016.

Notary Public

CERTIFICATION

STATE OF NEW YORK

COUNTY OF ALBANY

I, Mary Ellen Tardiff, shorthand reporter, a notary public within and for the State of New York, duly commissioned and qualified, do hereby certify that **Francis Fogarty, Jr.**, was duly sworn by me to testify to the truth in the cause aforesaid; that the testimony then given was reduced by me to stenotype in the presence of said witness, subsequently transcribed into English text and that the foregoing is a true and accurate transcript of the testimony so given.

I do hereby certify that his testimony was taken **June 27, 2016**, at the place as specified in the foregoing caption.

I do hereby further certify that I am not a relative, counsel or attorney of any party or otherwise interested in the outcome of this action.

Witness my hand this 29th day of June, 2016.



MARY ELLEN TARDIFF

Notary Public for State of New York
Commissioned in Albany County
My commission expires 11/07/2018.
UID 01TA4943991

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